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No. 06-1187

FILED
JUN 11 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The Supreme Court of the United States

REV. D. PHILIP VEITCH,

Petitioner,

v.

DONALD C. WINTER, SECRETARY OF THE NAVY, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONER

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PETITIONER'S REPLY

Petitioner submits the following reply in accord with Supreme Court Rule 15.6 to address new issues Respondents raised in their Opposition (the "Opp."). Respondents raise the issue of Petitioner's failure to exhaust administrative remedies as a reason to affirm the challenged decisions. Opp. at 5 (Statement - citing Pet. App. A54 n.13) and 8-9 (Argument - citing Pet. App. A10, A54 n.13). Respondents' suggestion is inappropriate for two reasons. First, the Court of Appeals recognized Petitioner had a valid claim under the Administrative Procedure Act challenging the Secretary's decision not to accept his resignation, a fact respondents did not contest. Pet. App. A15.

Second, the issues petitioner raises and his underlying claims fall within the exceptions recognized by *McCarthy v. Madigan*, 503 U.S. 140, 147-48 (1992). An administrative agency cannot declare the legality of the Navy's insistence that its undefined religious doctrine of pluralism trumps petitioner's rights under the First Amendment's Establishment and Free Exercise Clauses and 10 U.S.C. § 6031 to preach the doctrines of his church.[1] An administrative agency cannot enjoin the Navy's continued censorship or retaliation should Petitioner be returned to active duty, nor can it determine whether a junior chaplain's e-mails protesting a senior chaplain's sermon censorship or harassment can be considered disrespect. The Department of Defense Inspector General expressed doubts about the Equal Opportunity Investigator ("EOI")'s conclusions that petitioner's sermons violated pluralism and his command chaplain could censor those sermons; it ordered the Naval Inspector General (NIG)

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[1]Respondents have consistently defended the Equal Opportunity ("EO") Investigator's conclusions that petitioner's sermons were not pluralistic and his EO complaint was frivolous.

to reexamine the EOI's conclusions. Pet. App. A16 n.5. Ignoring § 6031 and First Amendment considerations, the NIG concluded the EOI was correct, i.e., petitioner's sermons were not pluralistic and his complaint of censorship was an abuse of process.

Whether the NIG's conclusion is consistent with § 6031 or the Establishment Clause and whether the NIG's failure to properly review the EOI's conclusions deprived the Secretary of Navy information critical to his decision to reject petitioner's request to withdraw his resignation are legal questions. *McCarthy*, 503 U.S. at 147-48, recognized administrative agencies are not competent to address these issues nor can they provide injunctive relief should petitioner be successful. Moreover, there is no statute requiring exhaustion of his claims. *See Darby v. Cisneros*, 509 U.S. 137, 146-47, 153 (1993) (APA claims do not require exhaustion unless required by statute). Likewise, whether the lower courts have improperly sanctioned government misconduct, *see* Petition at 11-16, by failing to carefully examine the Establishment Clause or statutory issues, *id.* at 16-18, are judicial not administrative issues.

Respondents also grossly misstate the context of the dispute between Protestant petitioner and CAPT Buchmiller, his Catholic command chaplain, alleging Veitch failed "to provide chaplaincy services in a manner consistent with the Navy's need to serve individuals from a range of religious backgrounds and his delivery of sermons that were 'derogatory toward other faiths.'" Opp. at 2. Petitioner's evidence showed (1) his congregation grew from about 20 or 30 to over 90 during the short time he was their pastor, precisely because he preached classic Protestant doctrine (which offended his Catholic superior but drew evangelical Protestants); (2) this growth occurred although his congregation was Pentecostal and evangelical whose worship

style was completely foreign to his denominational experience;[2] (3) his congregation loved him, and (4) CAPT Buchmiller was hostile to Protestant evangelicals.[3] CAPT Buchiller never heard petitioner's sermons, and neither CAPT Coyne nor the NIG investigators could identify which parts of petitioner's sermons were not pluralistic.

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[2] Petitioner alleged his assignment as a liturgical chaplain to pastor a non-liturgical, Pentecostal congregation whose worship style was foreign to his experience was evidence of CAPT Buchmiller's hostility toward both petitioner and the evangelical, charismatic Maranatha congregation. *See* App. A-13 ("Veitch was assigned to pastor the 'Maranatha' worship service, to which Veitch's conservative liturgical tradition was inimical.").

[3] The lower courts ignored uncontested evidence that the command chaplain's hostility to evangelical Protestants drove them from the Naples chapel and numerous Protestant congregations sprang up off base.

CONCLUSION

The Court should grant Rev. Veitch's Petition for Certiorari.

Respectfully submitted,

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